

## Federal Communications Commission

FCC MAIL SECTION

JUN 14 11 37 AM '95  
Before the  
Federal Communications Commission  
Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 93-136

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations.  
(Clewiston, Fort Myers Villas,  
Indiantown, Jupiter, Key Colony  
Beach, Key Largo, Marathon, and  
Naples, Florida)<sup>1</sup>

RM-8161  
RM-8309  
RM-8310

**MEMORANDUM OPINION AND ORDER**  
**(Proceeding Terminated)**

Adopted: June 5, 1995;

Released: June 14, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it the petitions for reconsideration filed by Key Chain, Inc. ("Key Chain") and Amatur Group, Ltd., WSUV, Inc., and Jupiter Broadcasting Corporation ("Joint Petitioners") of the *Report and Order*, 9 FCC Rcd 4051 (1994) essentially granting the proposal of Spanish Broadcasting System of Florida ("SBSF") to reshuffle frequencies of three Florida Keys stations. This reshuffling was intended to achieve SBSF's stated goal of eliminating "Receiver-Induced Third Order Intermodulation Interference ("RITOIE") in some automobile receivers within the vicinity of SBSF's antenna. SBSF filed an opposition to the Joint Petitioner's petition for reconsideration, and the Joint Petitioners filed a reply.

<sup>1</sup> The communities of Clewiston, Fort Myers Villas, Indiantown, Jupiter and Naples have been added to the caption.

<sup>2</sup> On April 22, 1994, an assignment of license from Sunshine Broadcasting, Inc. to WSUV, Inc., was consummated for Station WSUV(FM), Channel 292A, Fort Myers Villas, Florida (BALH-930903GI). In addition the call sign was changed from WSUV to WROC. On June 1, 1994, an assignment of license from Okeechobee Broadcasters, Inc., to Amatur Group, Ltd., was consummated for Station WOKC(FM), Channel 276C2, Indiantown, Florida (BALH-930907GI).

<sup>3</sup> Public Notice of the counterproposals was given on August 6, 1993, Report No. 1958.

<sup>4</sup> NBC withdrew its counterproposal on July 28, 1993, because its engineering information had been erroneously prepared. In accordance with Section 1.420(j) of the Commission's Rules, NBC states that it will not receive compensation or any other consideration for the withdrawal of its counterproposal.

<sup>5</sup> After the close of the comment period, Joint Petitioners filed

**BACKGROUND**

2. At the request of Spanish Broadcasting System of Florida, Inc. ("SBSF"), licensee of Station WZMQ(FM), Channel 280C2, Key Largo, Florida, the Commission issued a *Notice of Proposed Rule Making and Order to Show Cause*, 8 FCC Rcd 3886 (1993), proposing the substitution of Channel 292C2 for Channel 280C2 at Key Largo, and the modification of its license to specify operation on Channel 292C2. In order to accommodate the substitution of Channel 292C2 for Channel 280C2 at Key Largo, petitioner also requested the substitution of Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, and the modification of Station WKKB(FM)'s construction permit to specify operation on Channel 280C2; and the substitution of Channel 288A for Channel 292A at Marathon, Florida, and the modification of Station WAVK(FM)'s license to specify operation on Channel 288A.

3. In response to the *Notice*, comments were filed by SBSF, Florida Keys Electric Cooperative Association, Inc. ("FKEC") and Mary Kay Reich ("Reich"). Counterproposals were filed by Key Chain, Inc. ("Key Chain") (RM-8309); Okeechobee Broadcasters, Inc. ("OBI"), Sunshine Broadcasting, Inc. ("Sunshine")<sup>2</sup> and Jupiter Broadcasting Corporation ("JBC") ("Joint Petitioners") (RM-8310)<sup>3</sup> and Naples Broadcasting Corporation ("NBC"), licensee of Station WGUF(FM), Marco, Florida.<sup>4</sup> In response to the counterproposals, reply comments were filed by SBSF, Sterling Communications Corp., licensee of Station WSGL(FM), Naples, Florida ("Sterling"), Vero Beach FM Radio Partnership ("Vero Beach"), SBSF and joint petitioners.<sup>5</sup>

4. We issued *Orders to Show Cause* ("Order"), ordering Richard L. Silva, ("Silva"), permittee of Station WKKB(FM), Channel 288C2, Key Colony Beach, Florida, and Key Chain, licensee of Station WAVK(FM), Channel 292A, Marathon, Florida, to show cause why their respective channels should not be modified. In response to the *Order*, Silva filed no response and Key Chain filed a counterproposal. Accordingly, pursuant to Section 1.87 of the Commission's Rules, Silva was deemed to have consented to the proposed exchange of channels.

5. In their counterproposal, Joint Petitioners requested the substitution of Channel 276C1 for Channel 276C2 at Indiantown, Florida, and the modification of Station WOKC-FM to specify operation on Channel 276C1; substitution of Channel 292C3 for Channel 276C3 at Naples, Florida, and the modification of Station WSGL(FM)'s license to specify operation on Channel 292C3; substitution

a motion for leave to file out of cycle pleading and supplemental joint comments. SBSF filed a motion for extension of time, an opposition to motion for leave to file out of cycle pleading, and contingent opposition to supplemental joint comments and erratum. Gulf Communications Partnership ("Gulf") filed a motion for leave to file comments and comments. Joint Petitioners and WSUV, Inc. ("WSUV"), successor-in-interest to Sunshine filed a request for additional time to file comments, joint opposition to motion for leave to file comments and a joint reply to opposition. Gulf filed a response to joint petitioners' opposition. WSUV filed a notice of continued interest and intent to participate. Amatur Group, Ltd. ("Amatur"), successor-in-interest to OBI filed a notice of continued interest and intent to participate. Commission Rule 1.415(d) precludes the filing of comments after the close of reply comment period. In addition, Joint Petitioners' counterproposal is procedurally defective due to failure to state a willingness to reimburse the licensee of Station WSGL(FM), Naples Florida. See para. 4.

of Channel 275C2 for Channel 292A at Fort Myers Villas, Florida, and the modification of Station WSUV(FM)'s license to specify operation on Channel 275C2; substitution of Channel 258A for Channel 292A at Clewiston, Florida, and the modification of Station WAFC-FM's license to specify operation on Channel 258A; and the substitution of Channel 292C3 for Channel 258A at Jupiter, Florida, and the modification of Station WADY(FM)'s construction permit to specify operation on Channel 292C3. Three of the five affected stations were proponents of this counterproposal and Glades Media Company ("Glades"), licensee of Station WAFC-FM, Clewiston, Florida, a fourth station provided its signed consent to the change. Joint petitioners stated their intentions to reimburse Glades for its reasonable expenses involved in changing frequencies and transmitter location. However, Joint Petitioners failed to make a reimbursement commitment in the counterproposal to Sterling Communications Corp., licensee of Station WSGL(FM), Naples, Florida, who would have had to change channels, and would have been entitled to reimbursement for the reasonable costs in changing frequencies. Accordingly, the counterproposal was dismissed as technically and procedurally deficient.

6. In response to the *Order to Show Cause* Key Chain filed a counterproposal requesting the substitution of Channel 288C2 for Channel 292A at Marathon, Florida. Key Chain contended that the increased facilities would permit Key Chain to provide an enhanced level of service to the widely-dispersed chain of islands making up the Florida Keys. This proposal was mutually exclusive with the proposed substitution of Channel 288A for Channel 292A at Marathon, Florida. The substitution of Channel 288C2 at Marathon was feasible without affecting the other changes proposed in the *Notice*. Key Chain stated its intent to apply for Channel 288C2, if allotted. No other expressions of interest were received for Channel 288C2 at Marathon.

7. After consideration of the information filed in this proceeding, we believed the public interest would be served by the substitution of Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, the substitution of Channel 292C2 for Channel 280C2 at Key Largo, Florida, and the substitution of Channel 288C2 for Channel 292A at Marathon, Florida. In accordance with Section 1.420(g) of the Commission's Rules, we modified the license of Station WZMQ(FM) at Key Largo, Florida to specify operation on Channel 292C2; we modified the construction permit for Station WKKB(FM) at Key Colony Beach, Florida, to specify operation on Channel 280C2, and we also modified the license for Station WAVK(FM) at Marathon, Florida, to specify operation on Channel 288C2. Merits

8. Key Chain contends that the Commission erred in ruling that SBSF did not have to reimburse Key Chain for any costs incurred in changing WAVK's channel because WAVK would obtain an upgrade in the process. In denying any reimbursement to Key Chain, the Commission stated:

SBSF has stated its willingness to reimburse the licensee of Station WAVK(FM), Marathon, Florida, and the permittee of Station WKKB(FM), Key Colony Beach, Florida, for the reasonable cost associated with the change in channels. However, since the licensee of Station WAVK(FM) at Marathon sought and will receive an upgrade, no reimbursement for expenses will be required for the channel change at Marathon.

A licensee forced to change its channel is entitled to compensation from the party that benefits from the change. *Circleville, Ohio*, 8 FCC 2d 159 (1967). However, if the displaced party requests and receives a class upgrade, it is only entitled to reimbursement for the reasonable costs incurred in changing to an equivalent class channel, not for expenses incurred in the class upgrade. *Lonoke, Arkansas and Clarksdale, Mississippi*, 6 FCC Rcd 4861 (1991); *Mitchell, South Dakota*, 38 RR 2d 1688 (1976). The categories of reimbursable expenses are set forth in *Circleville, supra*, and the exact amount of such reimbursement is generally left to the good faith negotiation of the parties. *Othello, East Wenatchee & Cashmere, WA, and Wallace Idaho*, 6 FCC Rcd 6476 (1991). Accordingly, we agree that Key Chain is entitled to reasonable reimbursement for the equivalent costs of shifting WAVK to another Class A channel, but not for any expenses involved in the upgrade to a different class.

9. The Joint Petitioners first contend that their Joint Counterproposal was incorrectly dismissed on an inapplicable procedural technicality.<sup>6</sup> As discussed, *supra*, the Commission dismissed the Joint Counterproposal because Joint Petitioners failed to make a reimbursement commitment in their counterproposal to Sterling Communications Corp, licensee of Station WSGL(FM), Naples, Florida. In dismissing this counterproposal, the Commission relied on precedent that requires counterproposals to be technically and procedurally correct at the time they are filed. *Fort Bragg, California*, 6 FCC Rcd 5817 (1991) and *Report and Order, Broken Arrow and Bixley, Oklahoma and Coffeerville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989). The Joint Petitioners contend that this authority is inherently ambiguous and failed to provide them with adequate notice of what was required of them. They further contend that even if such authority is not ambiguous, it was unfair to dismiss their counterproposals since the omission was unintentional, relatively minor and quickly corrected. We reject these assertions and believe that the Joint Petitioners had sufficient notice that their counterproposals had to be technically and procedurally correct when filed. The reimbursement pledge is a fundamental component of any counterproposal and must be present or the counterproposal is deficient and must be dismissed. Accordingly, we reject the assertions of the Joint Petitioners and affirm our dismissal of the Joint Petition-

<sup>6</sup> SBSF, in its *Opposition to the Petition for Reconsideration*, asserts that the Joint Petitioners failed to file their petition within 30 days of the public notice of the *Report and Order* and that the petition should therefore be dismissed. Specifically, SBSF asserts that Section 1.4(b)(3) of the Commission's Rules should be used to determine the date of public notice for purposes of computing the filing deadline for a petition for reconsideration. Under SBSF's interpretation, the *Report and Order* went on public notice on August 16, 1994, the date of its release by the Commission. We disagree with this interpretation

and conclude that the appropriate guidelines are contained in Section 1.4(b)(1) of the Commission's Rules. See *Prineville and Sisters, Oregon*, 8 FCC Rcd 4471 (1993), *recon. pending*, 57 Fed. Reg. 57066 (Dec. 2, 1992). Under the guidelines set forth in this section, the *Report and Order* went on public notice on August 22, 1994, the date of the Federal Register summary. Accordingly, using August 22 as the starting date for computation, the petition for reconsideration had to be filed on or before September 21, 1994. Since it was filed on September 21, 1994, it was timely filed.

ers' counterproposals. See *Lonoke, Arkansas and Clarksdale, Mississippi*, 6 FCC Rcd 4861 (1991), *York, Alabama*, 4 FCC Rcd 6923 (1989), and *Circleville, Ohio*, 8 FCC 2d 159 (1967).

10. Furthermore, we find that there was an alternative technical basis that was an independent ground for dismissing the Joint Petitioners' counterproposal. Specifically, we find that the permissible area near Sanibel Island in which a transmitter site could be located ("reference site area"), while fully spaced and capable of providing a city-grade signal to the proposed community of license, is unsuitable due to its location in an environmentally sensitive region. The reference site area is comprised almost totally of Sanibel Island, home to many endangered species including bald eagles, which borders a National Wildlife Refuge. Furthermore, the record in this proceeding demonstrates that environmental and zoning restrictions would preclude the construction of the necessary broadcast tower on Sanibel Island. Moreover, the record in another proceeding, *Sanibel Island*, 7 FCC Rcd 850 (1992) attests to the unsuitability of Sanibel Island, which was cited as impossible to use for construction of a broadcast station because of environmental concerns. As to the tiny remaining area within the reference site area, the Joint Petitioners introduce a reference site at Punta Rassa within the Sanibel reference site area, which they insist could serve as location of a suitable site. As SBSF shows, the reference site itself lies in the water, and the closest land area is on the shoreline within a public park area. We have consistently rejected any proposed reference sites that fall within bodies of water. Accordingly, this finding warranted dismissal of the Joint Commenters' counterproposal independently of the reimbursement issue.

11. Joint Petitioners also contend that based on the evidence submitted concerning alleged intermodulation interference and the presence of alternative solutions, the record did not warrant a modification of the table of allotments. Joint Petitioners further contend that SBSF made various misrepresentations of material fact in their submissions to the Commission. These assertions fail to allege any specific, reversible error that the Commission made in finding: (1) that a legitimate technical/interference problem existed; (2) that amending the table of allotments was an appropriate remedy given the evidence presented; or (3) that the evidence presented by SBSF was sufficiently credible and accurate to warrant the relief sought by SBSF. On the contrary, we are persuaded by SBSF's Opposition (and the engineering exhibit attached thereto), that an alleged instance of misrepresentation involving a proposed loss area, was actually an inadvertent typographical error causing the attribution of a loss area to the wrong station. Likewise, we do not believe there was any intent to deceive regarding the permissible site area for the Fort Myers Villa upgrade as SBSF's engineering exhibit in its Reply Comments to Counterproposal disclosed this information. Accordingly, we reject Joint Petitioners' assertions concerning the sufficiency or credibility of the evidence.

12. Accordingly, pursuant to delegated authority, IT IS ORDERED that the petition for reconsideration filed by Key Chain is GRANTED and that the petition for reconsideration filed by Joint Petitioners is DENIED.

13. For further information concerning this proceeding, contact Robert B. Somers, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

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